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No. 82-52

In The

Supreme Court of the United States

October Term, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether an employer who creates and substantially controls a retirement benefit that pays less to women than men is absolved of liability under Title VII of the Civil Rights Act of 1964, as amended, because less attractive alternatives are offered, or because the employer contracts out for the benefit.

2. Whether the district court, in exercising its broad remedial powers under Title VII, properly awarded prospective relief.

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STATEMENT OF THE CASE

A. *Nature of the Arizona Deferred Compensation Plan.*

Since 1974,[1] the State of Arizona (employer) has offered a deferred compensation plan (plan) to its 35,000 employees. J.A.[2] at 6-7. The plan allows employees to apply to the state employer to defer until retirement the payment of a portion of compensation earned while working. The employer has discretion to approve or reject such applications. Exh. 2, p. 1; Exh. 10, p. 5; Exh. 11, p. 5. If the employer approves an employee's application, the employee may request payment of the deferred compensation upon retirement in one of three ways: (1) a lump sum; (2) a periodic payment for a specified length of time; or (3) a monthly annuity for the remainder of the employee's life. J.A. at 7-9.

The employer created the plan as an inexpensive way to help attract and retain employees. Exh. 10, p. 10; Exh. 11, p. 10. The employer absorbs some of the costs of administering the plan, but does not itself contribute any monies to the plan to supplement the deferred compensation earned by its employees. Ariz. Rev. Stat. Ann. § 38-871.C.1. (West Supp. 1975-1982); J.A. at 6-7. Nonetheless, the plan is attractive for two reasons. First, because deferred compensation is included in the employee's gross income when paid out and not when earned, current taxable income is reduced. J.A. at 7; Exh. 10,

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[1]The legislation establishing Arizona's deferred compensation plan was enacted in 1972. Ariz. Rev. Stat. Ann. §§ 38-871 to -874 (West 1974 & Supp. 1975-1982). The plan was implemented in 1974, when the state received a favorable letter of determination from the Internal Revenue Service. J.A. at 7.

[2]The Joint Stipulated Statement of Facts is reproduced in its entirety in the Joint Appendix (J.A.). The exhibits (Exh.) to the Joint Stipulated Statement of Facts have not been reproduced, but are contained in the Record (R.) at R. 15.

pp. 3-5, 8; Exh. 11, pp. 1, 3-5, 8. Second, when the deferred compensation is paid out, the employee is retired and generally in a lower tax bracket. *Id.* The lump sum payout option imposes immediate tax consequences upon receipt and therefore largely defeats the tax benefits of the plan.

As of August 18, 1978, there were 1,675 employees in the plan, 681 of whom were women. J.A. at 6. Of the 681 women 572, or 84%, had requested the lifetime annuity option. *Id.* Of all the options, the lifetime annuity option is the only one that allows an employee to fully insure benefits throughout retirement.

However, under the plan's lifetime annuity, women are paid less per month than similarly situated men. J.A. at 10. The result is that all women under the lifetime annuity receive less to live on each month while they are retired, and no more to live on each month while they are working, than similarly situated men who defer precisely the same amount of income. Unlike the employer's mandatory retirement program where employee contributions and benefits are sex-neutral, Ariz. Rev. Stat. Ann. §§ 38-781.01 to -781.37 (West 1974 & Supp. 1975-1982), the employer has never required that lifetime annuity payments under its deferred compensation plan be sex-neutral. Rather, pursuant to public procurement statutes, Ariz. Rev. Stat. Ann. §§ 41-729, -730, 41-1051 to -1056 (West 1974 & Supp. 1975-1982), the employer contracts with private companies for the use of sex-based actuarial tables to determine how retired employees will be paid income deferred under the lifetime annuity option of the plan. J.A. at 7-10, 12.

Indeed, the employer has not merely contracted with companies for the payment of lifetime annuity benefits solely on the basis of sex, but actually solicited a separate schedule of

monthly annuity benefits for males and females. In 1977, for example, the employer issued contract procurement documents that asked:

> H. 2. What is the monthly annuity per $1,000 applied for each of these combinations: What is the interest rate underlying these annuity rates?
>
> a. Male age 65 10 years Certain & Life
> b. Female age 65 10 years Certain & Life
> c. Male age 65 Straight Life
> d. Female age 65 Straight Life

Exhibit H to First Set of Interrogatories to Defendants with Answers, R. 12a.[3]

Some companies with whom the employer contracts use crude "setbacks" under which male mortality tables are setback anywhere from four to six years to approximate greater female life expectancy. J.A. at 12 (6 years); Exh. 3, p. 6 (4 years); Exh. 4 (5 years); Exh. 5, p. 5 (4 years); Exh. 6R, p. 10 (4 years); Exh. 7, p. 8 (5 years). Other companies under contract with the employer use segregated male and female mortality tables. J.A. at 12. The actuarial tables are based exclusively on the sex of the employee; none incorporate bona fide mortality variables such as smoking habits, alcohol consumption, weight, prior medical history, and family history. J.A. at 12-13.

In their statement of the case, the employer and amici significantly misrepresent to this Court the stipulated facts with respect to sex-segregated tables. Citing to the Joint Stipulated Statement of Facts, the employer states that "all of the insurance companies which were available to Arizona to provide life annuities used such sex-based mortality tables." Brief of Petitioners (Pet. Br.) at 3. Nothing, however, in either the Joint Stipulated Statement of Facts or in any other portion of the record supports that statement by the

[3] R.12a is part of the district court record.

employer.

The Joint Stipulation quite clearly states that "all of the companies *participating in the State Deferred Compensation Plan* use sex segregated actuarial tables." J.A. at 12 (emphasis added). Similarly, another portion of the stipulation—under "Description of the Plan"—provides: "The amounts received are determined by the use of actuarial tables published by the particular company. All tables presently in use provide a larger sum to a male than to a female of equal age . . . ." J.A. at 6, 10. The latter sentence, placed in context with the preceding sentence and under the title "Description of the Plan," clearly refers to tables *in use in the Arizona deferred compensation plan*, not all tables in use in the industry.[4] The stipulated description of the Arizona plan hardly supports the broad and frequently repeated assertions of the employer and amici that all companies "available" to Arizona use sex-based mortality tables.[5]

Once the employer contracts with each private company, the employer maintains close control over the operation of the plan through various contract provisions. For example, under the terms of the contracts, the employer, and not the employee, has the sole power to exercise all the rights, options, and privileges granted or permitted under the contracts.

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[4]The employer's misrepresentation of the facts about the availability of sex-neutral annuity plans is the erroneous theme and factual predicate for its entire brief; misrepresentations of these facts can be found in Pet. Br. at i, 3, 5, 8, 9, 11, 14, 15, 17, 26 & 28.

[5]The absence of any such stipulation is further evidenced by the employer's motion for summary judgment in the district court. There, it argued that respondents were obligated to prove the existence of unisex tables, R. 22, p. 6; obviously, if the parties had stipulated to the fact that no unisex plans were available, this argument would not have been necessary.

Exh. 3, pp. 1-5, 13; Exh. 5, p. 2; Exh. 6R, p. 5; Exh. 7, p. 6. Only the employer or the investment company, and not a participating employee in the plan, may amend or modify the investment contracts. Exh. 3, p. 3; Exh. 5, p. 8; Exh. 6R, p. 5. The employer, and not the employee, is the "contract owner," Exh. 3, p. 1; Exh. 5, pp. 1, 2; Exh. 6R, p. 1; Exh. 7, p. 6; or the "contractholder," Exh. 4, p. 1, of the deferred compensation instrument; the employee is the passive beneficiary of whatever actions the employer or company take. *Id.*

The employer's control over the plan is so extensive and complete that all deferred employee funds remain assets of the employer until payment, subject to the claims of the employer's general creditors. Exh. 10, p. 16; Exh. 11, p. 15. The employer retains complete legal title to all of the funds its employees choose to defer under the plan; employees have only a future, contingent legal claim for payment against the employer for their deferred compensation. Exh. 10 at pp. 4, 7, 16; Exh. 11 at pp. 4, 7, 15.

As a result, employees participating in the plan may only ask the employer to invest their deferred compensation in a particular investment option of a particular company; under the plan, the employer has an absolute right to approve or reject the employee's choice of an investment company and a payout option. Exh. 2, p. 2; Exh. 10, pp. 6, 8, 13; Exh. 11, pp. 5, 7, 12. And, if an employee faces a serious financial hardship and needs some or all of the money deferred under the plan, he or she may apply to the employer to withdraw monies, but the employer, in its sole discretion, decides whether to approve or deny such requests. Exh. 10, pp. 7, 14; Exh. 11, pp. 6, 13. Even if an employee decides to stop contributing to the plan, the monies already deferred generally

remain in the plan, subject to all of the foregoing restrictions, until the employee retires. Exh. 10, p. 6; Exh. 11, p. 6. Finally, if a participating employee dies before retirement, or if employment terminates by reason of resignation or dismissal, the employer, in its sole discretion, determines the manner of payment. Exh. 10, pp. 7-8, 13-14; Exh. 11, pp. 7, 13.

In addition to the contracts between the employer and the companies, the plan is closely monitored by the employer. The administrative regulations delineate the authority of the employer, through petitioner Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, to solicit and select the companies that may participate in the plan, Exh. 1, p. 9, and police the marketing approaches and selling practices used by the investment companies selected. *Id.* In fact, the regulations expressly prohibit all contact between the investment companies contracting with the employer and employees who participate in the plan unless the employer has first been presented with the company's solicitation documents and approved them in advance of their use. *Id.* at p. 11. Finally, only the employer has the right to disqualify contracting investment companies for violations of administrative rules. *Id.* The employer's role in this plan is active and dispositive.

B. *Respondents' Claim and the Proceedings Below.*

On May 3, 1975, respondent Nathalie Norris applied to participate in the plan. J.A. at 11; Exh. 2, p. 1. On May 9, 1975, the employer approved Ms. Norris' request and began deferring $199.50 from her salary each month. *Id.* Ms. Norris has requested a lifetime annuity under the plan with payments guaranteed for ten years after her retirement. J.A. at 11-12; Exh. 2. Assuming all things remain the same (amount

of salary deferred, return on salary deferred, choice of investment company and option), Ms. Norris will receive $320.11 per month for life, with ten years of payments certain, when she retires. J.A. at 12. Under precisely the same circumstances, a male employee would receive $354.06 per month with ten years certain, or $33.95 more each month than Ms. Norris. *Id.* This 10.6% differential computes to $407.40 over a one-year period, $4,074 over ten years, and $8,148 over twenty years.

Ms. Norris challenged the plan, alleging that the unequal payment of deferred compensation to similarly situated male and female employees violates section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (1976). Based upon the facts set forth above, the district court granted summary judgment in favor of Ms. Norris on her Title VII claim.[6] The district court rejected the employer's attempt to distinguish *Norris* from this Court's decision in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). Accordingly, the district court ordered the employer to equalize annuity payments to similarly situated male and female retired employees who participate in the Arizona plan. *Norris v. Arizona Governing Committee*, 486 F. Supp. 645, 652 (D. Ariz. 1980).

The Court of Appeals for the Ninth Circuit affirmed on the basis of this Court's decision in *Manhart*. *Norris v. Arizona Governing Committee*, 671 F.2d 330, 336 (9th Cir. 1982).

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[6]Respondents also alleged an equal protection claim under the fourteenth amendment that the court denied and respondents did not appeal.

SUMMARY OF ARGUMENT

In *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), this Court held that retirement or pension plans which classify women on the basis of sex rather than individual characteristics are illegal under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1976 & Supp. IV 1980).

Manhart involved an employer-operated pension plan which required unequal contributions from men and women; this case involves a deferred compensation plan offered by an employer with unequal payments to men and women. Both plans discriminate against women as a class; both plans treat women differently than men solely on the basis of their sex. The decisions of the Ninth Circuit Court of Appeals and the district court invalidating the discriminatory portion of the Arizona deferred compensation plan are fully faithful to *Manhart*.

The employer in this case exercises nearly total control over the plan; it solicits bids, contracts with a few private companies to invest and pay out deferred compensation to employees upon retirement, determines whether to accept or reject an employee's request for a particular type of investment and payout, and retains title to the funds until they are disbursed. Private companies with whom the employer contracts use sex-segregated actuarial tables to calculate lifetime annuity payments.

Contrary to the assertion of the employer, the record contains no evidence that all of the insurance companies in the United States use sex-based actuarial tables. Nor is there any evidence that this large employer, with 35,000 employees, could not have negotiated a contract with a company to use sex-neutral tables.

Nothing in this Court's opinion in *Manhart* suggests, as the employer argues, that there is an "open market exception" which takes this case outside the boundaries of Title VII. While this Court has acknowledged that an employer can give a lump sum to each individual employee upon retirement and allow him or her to go out into the free market and purchase whatever benefits he or she can obtain, that is very different from this case where the *employer* goes to the marketplace, expressly solicits sex-based bids, and then offers its employees a choice among only a few companies, all of which use sex-segregated actuarial tables.

As the employer itself admits, the lifetime annuity option under the plan classifies employees on the basis of sex. All women are deliberately treated differently than men. No further showing of employer intent is required. The employer here voluntarily provided an additional fringe benefit in the form of a deferred compensation plan, voluntarily decided to contract out the operation of that plan, and voluntarily contracted with companies it knew used sex-based tables. As a result, the employer created a discriminatory program affecting the "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1) (1976), and there is nothing unfair about holding the employer responsible for the choices made.

Title VII prohibits an employer from offering a discriminatory fringe benefit regardless of whether the employer also offers nondiscriminatory alternatives. Options and choices permeate the employer-employee relationship, but these choices do not affect the applicability of Title VII.

Finally, the district court's order of prospective relief is well within the broad remedial powers of Title VII to "make

persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

ARGUMENT

I.

UNDER *MANHART*, THE ARIZONA DEFERRED COMPENSATION PLAN CONSTITUTES A VIOLATION OF TITLE VII.

A. Manhart *Requires an Employer to Treat Women Employees as Individuals, Not as a Class.*

This is the first case to reach this Court concerning sex-based differentiation in employment-connected retirement plans since *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). *Manhart* involved an employer-operated retirement plan in which working women were required to make considerably higher monthly contributions than men. The employer's justification was that women, considered as a class, live longer on the average than men as a class, so that more periodic retirement payments would have to be made to women in the aggregate than men in the aggregate. This Court made clear in *Manhart* that such a justification is entirely antithetical to the premises of Title VII of the Civil Rights Act of 1964:

> The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. *It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.* . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the gener-

alization does not apply.

> That proposition is of critical importance in this case because *there is no assurance that any individual woman working* for the Department *will actually fit the generalization* on which the Department's policy is based. . . .

Manhart, 435 U.S. at 708 (emphasis added).[7]

Manhart also rejected the corollary proposition that Congress may have intended a special definition of discrimination in the context of employee group insurance coverage. 435 U.S. at 710. "*Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII.*" *Id.* (emphasis added).

The Court dismissed the idea that this application of Title VII was somehow unfair or even sanctioned unlawful discrimination. First, insurance schemes generally, and group insurance programs particularly, rely for their very success upon subsidization of poorer risks by better risks; as the Court recognized, there is nothing fundamentally unfair about requiring short-lived men to "subsidize" long-lived people of both sexes, rather than only long-lived men. 435 U.S. at 710. Second, the statutory scheme itself permits differences in compensation "based on [a] factor other than sex," 29 U.S.C. § 206(d) (1976), as incorporated in 42 U.S.C. § 2000e-2(h) (1976); because under a gender-neutral plan individual benefits are not determined on a hypothetical life span projected on the basis of, for example, race, sex, or other classifications forbidden under Title VII, no man

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[7] The statutory focus on the individual and the vitality of the rationale in *Manhart* were reaffirmed last term in *Connecticut v. Teal*, 102 S. Ct. 2525 (1982), where this Court rejected a "bottom line" defense to Title VII. *See infra* at 31-32.

could complain of unlawful discrimination. *Manhart*, 435 U.S. at 710-11 n.20.

In *Manhart* the sex-based averaging resulted in less take-home pay for each woman to meet expenses while working, with no guarantee that any individual woman would live to collect retirement benefits aggregating that collected by either a comparable man or the "average" man. Here, the sex-based approach to the life annuity program results in lower periodic retirement benefits for women to meet expenses once retired, with no guarantee that any individual woman will live to collect benefits aggregating that collected by either a comparable male or the "average" male. Under *Manhart*, Title VII precludes, "in the context of employee group insurance coverage" as well as in other contexts, 435 U.S. at 710, "treatment of individuals as simply components of a . . . sexual . . . class." *Id.* at 708. Predicting "[i]ndividual risks . . . by resort to classifications proscribed by Title VII," *id.* at 710, is no more valid when the prediction is used to discount women's benefits *after* they retire than when used to decrease their take-home pay when working.

B. *As the Ninth Circuit Correctly Held, Title VII Prohibits the Payment of Unequal Benefits on the Basis of Sex.*

The operative language of section 703(a) of Title VII is, as the Court emphasized in *Manhart*, 435 U.S. at 708, unambiguous in its focus on the individual:

> It shall be an unlawful employment practice for an employer-
>
> (1) . . . to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such *individual's* . . . sex . . . .

42 U.S.C. § 2000e-2(a) (1976) (emphasis added).

The statutory protections embrace benefits such as those involved here *Manhart*, 435 U.S. at 712 n.23 (pension benefits); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (health and disability benefits); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (state retirement benefits); *see also* Guidelines of Equal Employment Opportunity Commission, 29 C.F.R. § 1604.9 (1982).

The retirement program before this Court in this case differs from that involved in *Manhart* in only three respects, none of which are legally significant in terms of the application of Title VII. First, the sex-based differentiation is not in the employees' contributions into the plan, but instead, in the periodic life annuity benefits paid to employees upon retirement. Second, the plan is not solely employer-operated; rather, the employer contracts with private insurance companies and financial institutions while maintaining considerable direction and control over the operation of the plan. Finally, the plan offers employees some highly unsatisfactory alternatives to the preferred annuity benefit.

As petitioners in this case implicitly recognize by their choice of legal issues presented to this Court,[8] the first

[8] The two questions presented are quite narrowly drawn. Petition for Writ of Certiorari at i, Pet. Br. at i. The second question addresses only the appropriateness of the remedy if a violation of Title VII is found, while the first concerns whether either the availability of a nondiscriminatory option or the insured nature of the plan absolves the employer of responsibility for the sex-based differentiation

difference between this case and *Manhart* is one which is of no decisional consequence: As in *Manhart*, many individual women will in fact be harmed by the sex-based differentiation in annuity benefits because their life spans will more closely resemble that of the average male than that of the average female.[9] As will be shown more fully below, *infra* at 25-33, the other differences—the extent of employer involvement and the presence of nondiscriminatory options—in no way detract from the controlling effect *Manhart* has on this case.

In many ways, the sex-based differential in retirement benefits in this case is even more egregious than the differential in wages in *Manhart*. Nathalie Norris, like other retired women, will most likely receive this lesser benefit when she must live on a fixed income. The $33.95, or 10.6%, difference between her monthly payments and those of a similarly situated man amounts to $4,074 over 10 years and $8,148 over a 20-year period. In her older years, this lesser amount available to

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in life annuity periodic benefits. The assumption underlying the first question appears to be that this scheme *would* violate Title VII under the *Manhart* analysis if it were both totally employer-operated and without nondiscriminatory options.

Many of the amici appearing on petitioners' behalf fail to recognize the limited nature of the issues before the Court for review. "Only the questions set forth in the petition [for writ of certiorari] or fairly included therein will be considered by the Court." Rules of the Supreme Court of the United States, Rule 21.1.(a). For this reason, and because many of the issues raised by the amici were fully briefed in *Manhart*, respondents do not address in this brief many of the arguments that are disputed by the various amici but are beyond the scope of the issues before the Court in this case.

[9] As the Ninth Circuit observed in its decision, 84% of women have the same life span as 84% of men. *Norris v. Arizona Governing Committee*, 671 F.2d 330, 332 n.1 (9th Cir. 1982). *See also* Bergmann & Gray, *Equality in Retirement Benefits: The Need for Pension Reform*, 8 Civ. Rts. Dig. 25 (1975).

Ms. Norris, like all retired women, is likely to affect her ability to meet even her basic needs.

Since *Manhart*, numerous courts have concluded that retirement plans that require male and female employees to make equal contributions but pay smaller annuities to women than men are illegal under Title VII. *Spirt v. Teachers Insurance & Annuity Association*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Hannahs v. New York State Teachers' Retirement System*, 26 Empl. Prac. Dec. (CCH) ¶ 32,037, 26 Fair Empl. Prac. Cas. (BNA) 527 (S.D.N.Y. 1981). These courts have also held that retirement and pension programs which differentiate women as a class from men as a class violate Title VII under *Manhart*. *See also Retired Public Employees' Association v. California*, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. August 14, 1982) (No. 82-262); *Probe v. State Teachers' Retirement System*, 28 Empl. Prac. Dec. (CCH) ¶ 32,601, 27 Fair Empl. Prac. Cas. (BNA) 1306 (C.D. Cal. 1981), *appeal docketed*, Nos. 81-5865, -5866 (9th Cir. October 19, 1981); *Women in City Government United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Shaw v. International Association of Machinists & Aerospace Workers*, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980).

Only one circuit court has held to the contrary. *Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794). Respondents submit that *Peters* was poorly reasoned and fundamentally unfaithful to *Manhart*.

Peters held:

> The retirement plan which Wayne State offers its employees differentiates between women and men on the basis of longevity solely. Wayne State's selection of a retirement plan which calculates annuities from sex-segregated mortality tables is not [unlawful under Title VII].

Peters, 691 F.2d at 241. But as this Court held in *Manhart*, it is not true that "an actuarial distinction based entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on." 435 U.S. at 712-13 (quoting *Manhart v. City of Los Angeles, Department of Water & Power*, 553 F.2d 581, 588 (9th Cir. 1976)). The use of sex-segregated tables is no less offensive to the proscriptions of Title VII when used in computing payments as in *Norris* and *Peters* than in computing contributions as in *Manhart*. In each instance, the computations impermissibly treat "individuals as simply components of a . . . class." *Manhart*, 435 U.S. at 708.

Peters erroneously concluded that sex-segregated tables do not violate Title VII if the value of the annuities is actuarially equivalent for men and women. 691 F.2d at 238. *See also* Brief of National Association of Insurance Commissioners as Amicus Curiae in Support of Petitioners at 22-26; Brief of Equal Employment Advisory Council as Amicus Curiae in Support of Petitioners at 15-22. The argument that the benefit received by men and women is of equal value when computed on the basis of actuarial tables is nothing more than a reargument of *Manhart*: "The Department . . . contend[s] that . . . the differential in take-home pay . . . was not discrimination . . . because it was offset by a *difference in the value of the pension benefits* provided to the two classes of employees . . . ." *Manhart*, 435 U.S. at 706 (emphasis added).

As commentators have observed:

> This expectancy argument begs the question in a fundamental way. The ultimate issue is precisely whether mortality data may be classified by sex for the purpose of paying annuities—that is, whether sex may be used to predict longevity. No expectancy can be calculated until that question has been answered. The statement that some particular person is expected to live some certain number of years is dependent on a prior decision about how to classify that person. It is circular to use the expectancies generated by a predictor to justify using that predictor.

Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. Chi. L. Rev. 505, 512 (1980) (footnote omitted).[10] To look at the total value to women as compared to men presumes the classification by sex to be permissible and further presumes that the benefit to be examined is the total benefit that will inure to the class, not the monthly benefit that is actually received by an individual woman. Both presumptions—the classification by sex and the application "of group averages to individuals," *id.* at 513—were unequivocally proscribed by *Manhart*. *See Spirt v. Teachers Insurance & Annuity Association*, 691 F.2d 1054, 1060-62 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791).

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[10] In this important analysis, the authors conclude that both the validity of the sex-based mortality tables as predictors of longevity and their universal application are highly questionable. Brilmayer *supra* at 539-59. *See Manhart*, 435 U.S. at 709-10 & nn.17-18.

C. *Petitioners Misconstrue the Requirement of "Intent."*[11]

In an attempt to absolve itself of legal responsibility for the explicit sex-based differentiation among employees which is the subject of this lawsuit, the employer maintains that it did not "intend" to discriminate and therefore cannot be held to have violated Title VII.[12] This argument is premised upon a fundamental misunderstanding concerning the content of the motive requirement in a Title VII disparate treatment case.

As the employer recognizes, Pet. Br. at 24, unlawful employment discrimination under Title VII of the Civil Rights Act of 1964 may be established in one of two ways. The two available theories were summarized by this Court in *International Brotherhood of Teamsters v. United States*, 431

[11] Petitioners argue that the issue of intent was not raised in *Manhart* and "[w]here an issue is not raised, statements by the Court, or the lack thereof cannot be construed as rulings." Pet. Br. at 25 n.15 (citation omitted). To the contrary, the issue of intent was argued by the petitioners in *Manhart*. Opening Brief of Petitioners in *City of Los Angeles, Department of Water & Power v. Manhart* at 38.

[12] Several amici make a superficially similar but much more sweeping argument. They suggest that *any* retirement plan which provides "actuarially equivalent" benefits is one as to which there is no "intent" to discriminate within the meaning of Title VII, even if the employer runs the entire program itself. Brief of Teachers Insurance and Annuity Association and College Retirement Equities Fund as Amici Curiae in Support of Petitioners at 12-20; Brief of New York State Teachers' Retirement System as Amicus Curiae in Support of Petitioners at 11-13; Brief of Equal Employment Advisory Council as Amicus Curiae in Support of Petitioners at 15-16; *see Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794). Like the other arguments concerning whether *Manhart* precludes gender-differentiated retirement benefits, these contentions do not address any question properly before the Court for decision. *See supra* n.8. We note, however, that amici's "intent" arguments fail for basically the same reasons that petitioners' argument fails. *See infra* text.

U.S. 324 (1977):

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-266. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

431 U.S. at 335-36 n.15 (citations omitted).

The employer extracts from this passage the phrase "proof of discriminatory motive is critical," and suggests that a Title VII disparate treatment case requires some manner of proof of subjective state of mind beyond that established in the record in this case.[13] This Court has never suggested, however, that

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[13]Petitioners rely on a sentence in the district court opinion in *Norris* concerning the employer's lack of invidious discriminatory purpose, which petitioners mistakenly elevate to the stature of a relevant finding of fact. Pet. Br. at 25. First, the district court's determination was made in the context of its understanding of the equal protection clause of the fourteenth amendment, and not with regard to Title VII legal standards. *Norris v. Arizona Governing Committee*, 486 F. Supp. 645, 651 (D. Ariz. 1980). Second, while petitioners now recognize that "the instant case does not involve a facially neutral employment practice since the use of sex-based actuarial tables is clearly not facially neutral," Pet. Br. at 24 n.14, the district court was of the view that "[s]ince the Arizona statute is gender-neutral on its face, the Court must then consider whether the classification . . . results nevertheless

the discriminatory motive, intent, or purpose required in a Title VII disparate treatment case is anything other than knowingly treating all women differently from all men on the basis of gender.[14]

The line of cases deriving from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), on the question of the mode of proof of the requisite discriminatory motive and purpose, indicates that the only "state of mind" issue in Title VII disparate treatment cases is whether the employer consciously drew an explicit, invariable line on the basis of sex, race, or other criteria that Title VII proscribes. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978).

In all of these cases, the employer purported to be making employment decisions upon the basis of criteria *other than*

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in an adverse effect . . . ." 486 F. Supp. at 651. The district court therefore erroneously evaluated the case as one of disparate impact, not disparate treatment. Because the case was decided upon stipulated facts that are silent as to the state of mind of the employer, and because there was no testimony on any issue, the court's statement that the classification was "somewhat less than the purposeful invidious gender-based discrimination necessary for a finding" of a violation of the fourteenth amendment can only be a conclusion of law and not one of fact. *Id.*

[14]This interpretation is obviously what the Court had in mind by its recognition in *Teamsters* that "discriminatory motive . . . can in some situations be inferred from the mere fact of differences in treatment," *Teamsters*, 431 U.S. at 335, and of its citation to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977). In *Arlington Heights*, at the pages cited, the discussion concerns when use of racial criteria can be inferred simply from "a clear pattern, unexplainable on grounds other than race . . . even when the governing legislation appears neutral on its face." *Id.* at 266. This interpretation is also consistent with the meaning of intent in the customary legal sense. *See, e.g.*, W. Prosser, Law of Torts 31 (4th ed. 1971).

the race or sex of the employee. The question before the Court in those cases was how it could be proven, nonetheless, "that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.' " *Furnco*, 438 U.S. at 576 (quoting *Teamsters*, 431 U.S. at 358). Thus, "the allocation of burdens [of proof] . . . [was] intended progressively to sharpen the inquiry into [this] elusive factual question of intentional discrimination," while leaving the ultimate burden of proof on the plaintiff. *Burdine*, 450 U.S. at 255 n.8. But the "intentional discrimination" which ultimately must be proven is simply "the consideration of impermissible factors" in making employment decisions. *Id.* at 254 (quoting *Furnco*, 438 U.S. at 577). This Court has never imposed a requirement that an employee or applicant show *why* the employer engaged in a practice of using racial or sexual criteria, or whether the idea to do so originated in the employer's mind or in the mind of someone else.

Here, no "facially neutral employment practice [is involved] since the use of sex-based actuarial tables is clearly not facially neutral." Pet. Br. at 24 n.14. Because the employer concedes that the plan classifies on the basis of sex, there is simply no "intent" issue as in the *McDonnell Douglas* line of cases. Rather, as in *Manhart*, the practice here at issue indisputably fails "the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " *Manhart*, 435 U.S. at 711 (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971)). Because the employer here knowingly and consciously classified women on the basis of their sex, no further inquiry into intent is required

under this Court's precedents.[15]

Even under the *McDonnell Douglas* line of cases, the employer has the burden of articulating "some legitimate, nondiscriminatory reason" for its action. *Furnco*, 438 U.S. at 578 (quoting *McDonnell Douglas*, 411 U.S. at 802). The record in this case contains no evidence of any lawful reason for using sex-segregated tables, nor could any legitimate reason be articulated under this Court's decision in *Manhart* and this plan.

The employer argues, nonetheless, that "whether 'facially discriminatory practices' amount to intentional discrimination by an employer depends upon whether it is the employer who is responsible for the facially discriminatory practice." Pet. Br. at 26. This circular reasoning does little to further the analysis. Moreover, there is no case law under Title VII that even remotely suggests that liability for the practices of an employer is contingent upon where the idea originated.

In a world in which employers increasingly turn to consulting specialists and other contractors in administering labor relations, the effect of the employer's suggestion on

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[15]The employer has unpersuasively relied upon *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), as somehow relevant on the issue of intent. Pet. Br. at 27. That case, however, dealt with a facially-neutral rule—an absolute preference for veterans. The exclusion of women in that case, unlike this case, was not on the basis of sex, but because they were nonveterans. 442 U.S. at 275. In *Feeney*, unlike this case, some women fell into the favored class and many men who were not veterans were excluded. The primary question before the Court in *Feeney* was whether, under the fourteenth amendment, the employer had an unconstitutional "gender-based discriminatory purpose." *Id.* at 276. Thus, *Feeney* is distinguishable on three important grounds: It involved (1) a facially-neutral policy (2) not drawn along gender lines (3) challenged under the fourteenth amendment, not Title VII.

Title VII could be profound. Employers could contract out for various services relating to terms and conditions of employment and then claim they did not "intend" the discriminatory programs which they knowingly and expressly adopted. Everything from fringe benefits to preparation of the payroll could be contracted out and provided on a discriminatory basis on the ground that "they did it, not us." The argument, if adopted, would allow an employer to totally absolve itself of responsibility under Title VII by contracting with third parties.

There is an obvious anomaly in petitioners' position on the meaning of the intent or motive requirement in Title VII disparate treatment cases. As the employer recognizes, *no* proof of discriminatory motive or purpose is required under Title VII where a facially-neutral employment policy has a discriminatory impact on one protected class. Pet. Br. at 24 n.14; *see, e.g., Teamsters*, 431 U.S. at 335-36 n.15. Thus, petitioners would concede that an employer could be liable for the discriminatory impact of a facially-neutral employment policy selected by someone else acting on the employer's behalf, even though the employer had no knowledge of, nor gave any approval to, that impact. Where, however, an employer explicitly and knowingly approves sex-based differentiation developed by a third-party contractor, petitioners' theory would permit an employer to escape liability. It is at least unlikely that Congress has erected a statutory scheme which turns so topsy-turvy ordinary notions of culpability and responsibility.

Finally, the employer posits another reason for denying intentional discrimination: "Arizona had no choice but to make available life annuities based on sex-distinct actuarial tables if it was to offer them at all since all available

insurance companies used such tables." Pet. Br. at 26. This argument is based upon petitioners' misstatement of the stipulated facts regarding nondiscriminatory annuity plans.

The record is silent as to the availability of nondiscriminatory plans. On the other hand, the state procurement documents requesting contract bids expressly solicit a breakdown of annuity payments by sex. Exhibit H to First Set of Interrogatories to Defendants with Answers, R. 12a. Thus, even if the only annuities currently used *in the industry* were sex-based, the employer here has foreclosed the development of a nondiscriminatory annuity plan for its employees through the use of the contract procurement documents that solicit contract bids from private companies solely on the basis of the sex of the employee.

Furthermore, the State of Arizona successfully maintains a mandatory nondiscriminatory retirement plan for all employees. Ariz. Rev. Stat. Ann. §§ 38-781.01 to -781.37 (West 1974 & Supp. 1975-1982). Indeed, it is questionable that an employer with 35,000 employees, J.A. at 6, could not have found a single insurance company willing to write a gender-neutral policy for its employees. For example, the University of Minnesota recently changed to a unisex pension plan for its employees through two private insurance companies. Chronicle of Higher Education, October 13, 1982, at 25, col. 2. There is, then, no factual predicate for the employer's assertion regarding the availability of alternatives; rather, the facts in the record, coupled with the available research, strongly suggest the contrary.

II.

THE EMPLOYER IS LIABLE FOR CREATING AND CONTROLLING A DISCRIMINATORY BENEFIT

A. *The Employer Created and Controls the Discriminatory Plan.*

The employer argues that the insurance carriers, and not the State of Arizona, are responsible for the use of sex-based actuarial tables. Pet. Br. at 11. The involvement of the state, petitioners argue, is purely "passive." *Id.* at 28-31.

There is, however, nothing passive about Arizona's involvement as the employer. Rather, as the court of appeals correctly stated, Arizona (1) *makes the selection* of certain companies as funding media; (2) *approves participation* in the plan; and (3) *deducts the appropriate amount* from the employee's salary. *Norris v. Arizona Governing Committee*, 671 F.2d 330, 334 (9th Cir. 1982).

The employer's involvement extends even further. The employer prepares contract specifications and publicly issues procurement documents requesting sealed competitive bids for the state contract from interested companies, as prescribed by Arizona law. Ariz. Rev. Stat. Ann. §§ 41-729, -730, 41-1051 to -1056 (West 1974 & Supp. 1975-1982). It contracts directly with the insurance companies or financial institutions. Exh. 3-8. As the contract owner, the employer, and not its employees, has the power to exercise the rights, options, and privileges granted or permitted under the contracts. *See, e.g.*, Exh. 3, pp. 1-5, 13; Exh. 5, p. 2; Exh. 6R, p. 5; Exh. 7, p. 6. And, until the money is paid out to the employee, it is the employer, and not the employee, which holds title to the deferred funds. Exh. 10, p. 7; Exh. 11, p. 7.

From solicitation of the bids to the point the deferred wages are released and the retiree finally has possession of his or her deferred compensation, the involvement of the state as an employer is pervasive. The insurance companies participate for the convenience, and at the request, of the employer. The employer's attempt to evade responsibility on the basis of its allegedly passive participation is totally contrary to the facts in the record.

This is not a case, as the employer suggests, of attempting to hold a party liable for the acts of another. Pet. Br. at 12. Here, unlike *General Building Contractors Association, Inc., v. Pennsylvania*, 102 S. Ct. 3141 (1982), the employer established the plan, had knowledge of, and indeed encouraged, the discrimination that was explicitly contained in the contracts. The employer is liable because of its own independent actions.

Similarly, the employer's reliance on several decisions of this Court to support the proposition that an employer should not be held liable under Title VII because of conditions or obstacles "which were not created by the defendant and over which it had no control" is also misplaced. Pet. Br. at 17. In *Harris v. McRae*, 448 U.S. 297 (1980), this Court upheld the constitutionality of the Hyde Amendment that limited the circumstances under which the federal government would pay for abortions under the Medicaid Act. The Court stated, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those [such as indigency] not of its own creation." 448 U.S. at 316.

In contrast, rather than refusing to remove an obstacle, Arizona "affirmatively offered a plan, better than that available for purchase by an individual, which discriminated against

women." *Norris v. Arizona Governing Committee*, 671 F.2d 330, 335 (9th Cir. 1982). Though the employer argues that this distinction is "semantical, not real," Pet. Br. at 19 n.11, the employer's development and implementation of a discriminatory plan is in no way comparable to the failure to remove an obstacle not of its own creation.

The employer also urges that *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), somehow relate to the issue of control. *Manhart* expressly rejected the argument that either the holding or the reasoning of *Gilbert* is controlling in this type of case:

> In *Gilbert* the Court held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute sex discrimination within the meaning of Title VII. Relying on the reasoning in *Geduldig v. Aiello*, 417 U.S. 484, the Court first held that the General Electric plan did not involve "discrimination based upon gender as such." . . . ***On its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability.***

Manhart, 435 U.S. at 715 (emphasis added) (footnote omitted).

For the same reasons, the employer's reliance on *Satty* must also fail. *See Manhart*, 435 U.S. at 710-11 n.20 & 716 n.29. In *Satty*, this Court held that an employer's policy of denying accumulated seniority to female employees returning from pregnancy leave violated Title VII, 434 U.S. at 139, but that the policy of not awarding sick-leave pay to pregnant employees is "legally indistinguishable from the disability-insurance program upheld in *Gilbert*." 434 U.S. at 143. Thus, in both *Gilbert* and *Satty*, the Court merely concluded that where there is no gender-based discrimination, there is no violation of Title VII. In contrast, here, as in *Manhart*, there is gender-based discrimination in the use of sex-segregated actuarial tables.

B. *There is No Open Market "Exception" to Title VII; Rather, the Statute Does Not Apply Outside the Boundaries of the Employer-Employee Relationship.*

Title VII has two primary statutory exceptions relating to sex discrimination. The first is a bona fide occupational qualification (bfoq). 42 U.S.C. § 2000e-2(e) (1976). Under this statutory provision, employers are permitted a limited exception to the proscriptions of Title VII where, for example, sex is clearly a qualification for the job. *Dothard v. Rawlinson,* 433 U.S. 321 (1977). The other limited exception under Title VII is the Bennett Amendment, section 703(h), which provides that differentiation in wages and compensation between men and women is lawful if it is authorized under the Equal Pay Act of 1963. 42 U.S.C. § 2000e-2(h) (1976). As the employer has implicitly conceded, neither exception applies to this case.

Rather, the employer seeks to engraft an additional exception onto Title VII. Seizing upon dictum in *Manhart,* the employer asks this Court to exempt discriminatory employment practices because such discrimination derives from practices in the marketplace that are not initially related to the employment context. There is nothing in this Court's opinions or the statutory language that would sanction this additional exception.

In *Manhart,* this Court stated:

> Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

435 U.S. at 717-18 (footnote omitted). Relying solely upon this language, and its misstatement of the fact to which the parties stipulated–that all companies in the plan, not all

companies in existence, use sex-based actuarial tables, J.A. at 10-12—the employer seeks to create an "open market exception." It argues that because all insurance companies use sex-based actuarial tables, the state is only reflecting the private market. The fallacies in this argument are three-fold. First, *Manhart* did not create an "open market exception." Second, as discussed *supra* at 24, nothing in the record shows that sex-neutral tables were unavailable or nonexistent. Third, Title VII does not allow an employer to avoid statutory responsibility by contracting out.

The language relied upon by the employer and amici as creating an open market exception is nothing more than a description of the boundaries beyond which Title VII does not extend. Title VII regulates aspects of the employer-employee relationship; Title VII does not regulate transactions in the open market outside of the employer-employee context. This Court's reference to the open market simply acknowledges that Title VII would not proscribe an employer's severance pay plan for employees upon termination. *See* Gold, *Of Giving and Taking: Applications and Implications of City of Los Angeles, Department of Water & Power v. Manhart*, 65 Va. L. Rev. 663, 674, 698 (1979). Thus, under *Manhart* an employer can set aside certain amounts for each employee, and, upon termination, that employee can go out on the open market and buy whatever he or she can obtain with the money.

Here the employer, and not the employee, went to the private marketplace and secured a discriminatory annuity plan and offered it to employees. As stipulated by the parties, between 1974 and 1979, only eight funding media have ever participated in the plan, J.A. at 7-9, three of which never even offered a life annuity. *Id.* Several companies no longer

participate. *Id.* Thus, the companies with which an employee can contract are limited, and are selected by the employer. There is nothing in the record to show that the Arizona plan contains all of the options, all of the companies, and all of the possibilities available on the open market.

The key with respect to this fringe benefit package is that it constitutes "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1976). Therefore, Title VII applies, regardless of whether the employees could buy similar kinds of benefits on their own. Once an employer undertakes to provide a fringe benefit, it must do so in a nondiscriminatory fashion.

Thus, the task is to draw a line where the employment relationship ends and the open market begins. In this case, Congress has drawn that line. The point beyond which Title VII no longer takes effect is where no "compensation, terms, conditions, or privileges of employment" are involved. 42 U.S.C. § 2000e-2(a)(1) (1976). There is nothing in Title VII, or the decisions of this Court, that supports the line-drawing the employer suggests.

C. *The Availability of Nondiscriminatory Options Does Not Save the Discriminatory Option.*

The employer's plan offers three alternatives upon retirement. The first is a lump sum option which is sex-neutral. J.A. at 7-10. Alternatively, employees may select fixed monthly payments for a fixed number of months, an option that is also sex-neutral. *Id.* at 9. The final alternative is the life annuity based upon sex-segregated actuarial tables. *Id.* at 10, 12. As of August 18, 1978, 84% of the women participating in the plan had elected some form of future annuity option. *Id.* at 6.

The principal reason underlying the preference for the life annuity is obvious. As stated by the employer, the lump sum option subjects employees to immediate tax consequences and provides a reduced amount with which to purchase benefits on the open market. Pet. Br. at 15. "*If forced to purchase the annuity individually with a lump sum payout, the employee gets less for his or her dollar.*" *Id.* at n.9 (emphasis added). By opting for the lump sum an employee loses "the tax advantages which are the principal motivation for the plan." Brief of American Academy of Actuaries as Amicus Curiae in Support of Petitioners at 8. The other alternative, a fixed monthly payment for a fixed number of months, is no option at all for a woman (or a man) attempting to insure a steady income throughout retirement. The options offer little in the way of meaningful alternatives.

The employer has full control over the options selected by an employee. Although an employee can request investment in a particular option of a particular company, the employer has an absolute right to approve or reject both the choices of the investment as well as the payout option. Exh. 10, pp. 6, 8, 13; Exh. 11, pp. 5, 7, 12. Because the employer has an absolute veto power over the employee's selection, the options may not even be available to the employee.

Finally, no precedent under Title VII suggests that an employer is absolved of liability for discriminating against employees with respect to one option simply because there are other nondiscriminatory options available. To the contrary, such an argument closely resembles the argument rejected by this Court in *Connecticut v. Teal*, 102 S. Ct. 2525 (1982). There, this Court refused to relieve an employer of liability under Title VII for its discriminatory promotional examination where the " 'bottom line' result of the promo-

tional process was an appropriate racial balance." 102 S. Ct. at 2529. As stated by the Court:

> It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. We recognized in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed.2d 657 (1978), that fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the "statute's focus on the individual is unambiguous." *Id.*, at 708, 98 S. Ct. at 1375.
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> . . .
>
> Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired.

102 S. Ct. at 2535. Similarly, Title VII does not permit an employer to discriminate against a woman who desires to have a life annuity with all of the accompanying tax benefits, on the ground that concededly less attractive, albeit nondiscriminatory, alternatives are available to her.[16]

Today, fringe benefits come in a variety of forms. More and more, employers are offering cafeteria-style benefit packages to meet the particular needs and lifestyles of employees. *See* I.R.C. § 125 (Supp. III 1979). For example, employees may be given a choice of exchanging duplicate or unnecessary medical coverage for more money in profit-sharing plans. Employees may be given the choice of exchanging some profit-sharing for an extra week of vacation or exchanging unneeded benefits for day care services at a reduced rate or no cost.

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[16]Under the equal protection clause of the fourteenth amendment, this Court last term invalidated a sex-based classification despite the availability of nondiscriminatory alternatives. *Mississippi University for Women v. Hogan*, 102 S. Ct. 3331 (1982).

Many of these same or similar benefits are also present in the marketplace. Thus, if adopted by this Court, the clear implications of petitioners' argument are that an employer may offer a discriminatory benefit—one that discriminates, for example, on the basis of race, sex, or religion—*provided* there is at least one option that is nondiscriminatory. Such an exception would consume the rule and emasculate the application of Title VII to employer-offered fringe benefits.

III.

THE RELIEF GRANTED BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS WAS PROPER.

The district court ordered the following remedy:

> The plaintiff, Nathalie Norris, on behalf of herself and for the class, is entitled to a summary judgment permanently enjoining the defendants from carrying out their obligations under A.R.S. § 38-871 *et seq.*, through the use of sex segregated actuarial tables, and for an order directing that annuity payments to female employees who have retired shall be equal to similarly situated male employees.

Norris v. Arizona Governing Committee, 486 F. Supp. 645, 652 (D. Ariz. 1980). The court of appeals affirmed the relief. *Norris v. Arizona Governing Committee*, 671 F.2d 330, 336 (9th Cir. 1982). The method of achieving equalization of benefits was not specified by either court.

The employer characterizes this relief as "in effect, retroactive in nature." Pet. Br. at 32 n.17. This is plainly incorrect. The relief awarded by the district court did not include retroactive relief. 486 F. Supp. at 652. Respondents subsequently moved to amend the judgment to include equalization of past payments, R. 25, and that motion was denied. R. 31. No appeal was taken.

The provisions of Title VII give a court broad discretion in fashioning a remedy for illegal discrimination. Upon finding that a violation of the Act exists, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1976). A purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Limiting damages to injunctive relief would not serve this purpose: "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Id.* at 417

In *Manhart*, this Court declined to order retroactive relief, recognizing a limited instance in which "[t]he *Albemarle* presumption in favor of retroactive liability can seldom be overcome." 435 U.S. at 719. Realizing that its decision could have broad implications on existing pension and insurance plans, and believing that the "threat of a backpay award" was not necessary "to cause other administrators to amend their practices to conform to this decision," 435 U.S. at 721, the Court ordered purely prospective relief.[17]

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[17]Contrary to petitioners' claim that the "decision in *Manhart* was quite narrow," Pet. Br. at 10, the Court recognized that its decision would have significant consequences. *Manhart*, 435 U.S. at 720-23. Obviously, if this Court had intended its decision in *Manhart* to be narrowly construed, its notable caution in fashioning a remedy would have been unnecessary. *Id.* at 718-23. As stated by the Ninth Circuit, pension plan administrators doing business after *Manhart* "could no longer reasonably think that the distribution of unequal benefits did not violate Title VII." *Retired Public Employees' Association v. California*, 677 F.2d 733, 738 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. August 14, 1982) (No. 82-262).

The prospective relief ordered by the district court in this case is entirely consistent with *Manhart*. The court properly directed that future annuity payments to female employees who have already retired be equal to similarly situated male employees.

The employer's argument against the remedy echoes the argument on liability—the insurance companies, not the employer, are the culprits, therefore the remedy against the employer is inappropriate. For all of the reasons discussed above, and the reasons set forth below, this argument is equally unpersuasive in the context of a remedy.

For example, the employer cites numerous lower court decisions in support of its contention that because of the employer's passive involvement, the remedy in this case was inappropriate. Pet. Br. at 29-30. As discussed *supra* at 25-26, there is nothing passive about the employer's involvement. Thus, the cases relied upon by the employer are inapplicable.

Petitioners also argue that in *Spirt v. Teachers Insurance & Annuity Association*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791), an employer, in a similar challenge to a retirement plan, was simply enjoined from making contributions to any pension fund using sex-based mortality tables. Pet. Br. at 31. *Spirt* is one of several cases brought against the Teachers Insurance and Annuity Association (TIAA) and the College Retirement Equities Fund (CREF). *See also Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794). *Spirt* and *Peters*, unlike this case, posed the additional issue of who is an employer under Title VII. *Spirt*, 691 F.2d at 1063; *Peters*, 691 F.2d at 238.

In reliance upon the Ninth Circuit Court of Appeals decision in *Norris*, the court in *Spirt* upheld the lower court's determination that (1) TIAA-CREF was an employer under Title VII that (2) could be enjoined from using sex-based mortality tables and (3) ordered the use of gender-neutral mortality tables. 691 F.2d at 1063, 1066. In addition, Long Island University, the other named defendant, and the university at which the plaintiff taught, was enjoined from contributing to any pension fund using sex-based mortality tables. *Id.* at 1066. The broad relief extended, then, to TIAA-CREF and the University, both deemed to be employers under Title VII. Similarly, in this case, the relief properly extends to the employer, the State of Arizona. Both cases correctly require the equalization of benefits. As stated by the court of appeals in *Norris*:

> The [district] court has not said that the companies may not use sex-segregated annuity tables. Nor has it joined the companies as defendants or required the companies to pay the adjusted annuities. All the court has done is tell the employer that it may not offer a fringe benefit which treats an individual woman differently than an individual man.

Norris, 671 F.2d at 333.

The employer's attempt to extricate itself from liability on the basis of the involvement of the insurance companies has been rejected by other courts. *Peters*, 691 F.2d at 238 ("A Title VII employer cannot avoid its liabilities under the statute by claiming it has selected services which 'happen' to discriminate against women. . . . None of these facts relieves Wayne State of responsibility for *choosing* Teachers Annuity's retirement plan for its employees." (Emphasis original.)); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) (without the affirmative and active participation of the em-

ployer the program could not operate).

Finally, the employer argues that the relief ordered "overturns the nondiscriminatory judgment of the state legislature that the plan was to operate 'without cost or contribution from the state . . . .' " Pet. Br. at 31, *citing* Ariz. Rev. Stat. Ann. § 38-871.C.1 (West Supp. 1975-1982); *see also* Pet. Br. at 32. In response, the court of appeals correctly stated:

> [T]he fact that Arizona did not want to pay for the plan does not insulate it from making payments to equalize the treatment received by women. If this were not the case, a state could insulate itself from Title VII or § 1983 damages merely by saying it did not intend for its taxpayers to be burdened.[18]

Norris, 671 F.2d at 336. Furthermore, a state law which conflicts with a federal law is preempted by the federal law. U.S. Const. art. VI, cl. 2. Therefore, an employer cannot shield itself from liability on the basis that state law conflicts with Title VII.

The relief granted by the district court was well within the discretion allowed under Title VII.

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[18] For the same reason, the employer's reliance on *Ford Motor Co. v. EEOC*, 102 S. Ct. 3057 (1982), is misplaced.

CONCLUSION

Under the deferred compensation plan designed by the State of Arizona, women receive smaller monthly payments under the annuity option than similarly situated men. The court of appeals correctly found this to be a violation of Title VII under *Manhart* and upheld the prospective relief granted by the district court. The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted this 8th day of January, 1983.

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